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No. 97-605

In the
Supreme Court of the United States
October Term, 1997

BEN OEHRLEINS AND SONS AND DAUGHTER, INC., *et al.*,
Petitioners,

v.

HENNEPIN COUNTY, MINNESOTA,
Respondent.

ROBINSON RUBBER PRODUCTS CO., INC., *et al.*,
Petitioners,

v.

HENNEPIN COUNTY, MINNESOTA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Do customers of garbage haulers have standing under the dormant Commerce Clause to challenge a flow control ordinance that regulates only garbage haulers and to recover damages for disposal costs passed on by garbage haulers?

2. Was it error for the court of appeals to hold that restrictions on in-state disposal of solid waste generated in-state do not discriminate against interstate commerce and must be reviewed under the Pike balancing test?

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Respondent Hennepin County opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered on June 9, 1997 (petition for rehearing with suggestion for rehearing en banc denied July 10, 1997).

STATEMENT OF THE CASE

The relevant background of this case is set forth in detail in the court of appeals' decision, Ben Oehrleins and Sons and Daughter, Inc. et al. v. Hennepin County, 115 F.3d 1372 (8th Cir. 1997) (Petition Appendix ("Pet. App.") A). The following facts are provided to correct inaccuracies and omissions in Petitioners' Statement Of The Case.

This consolidated matter involves two actions, Ben Oehrleins and Sons and Daughter, Inc. et al. v. Hennepin County, No. 4-94-63 (D. Minn. filed Jan. 20, 1994), and Robinson Rubber Products Co., Inc. et al. v. Hennepin County, No. 4-95-220 (D. Minn. filed April 3, 1995), both of which allege that Hennepin County Ordinance 12 discriminates against interstate commerce in violation of the dormant Commerce Clause. Ordinance 12 is a "flow control" or "designation" ordinance which regulated the disposal of Hennepin County, Minnesota mixed municipal solid waste both within Minnesota ("intrastate designation") and, for a shorter period of time, outside of Minnesota ("interstate designation").

Although the claims in the two actions are virtually identical, the petitioners (plaintiffs below) are distinct and differently situated. The Oehrleins petitioners include several Minnesota garbage haulers, one Minnesota landfill and one Iowa landfill. The Robinson Rubber petitioners are Hennepin County customers of garbage haulers, also referred to as waste "generators."

Petitioners challenge two aspects of the court of appeals' decision. The Robinson Rubber petitioners alone challenge the court of appeals' ruling that customers of garbage haulers do not have standing under the Commerce Clause to challenge Ordinance 12. The Oehrleins and Robinson Rubber petitioners both challenge the court of appeals' ruling that intrastate designation under Ordinance 12 does not discriminate against interstate commerce and, therefore, must be reviewed under the Pike balancing test.[1]

A. Facts Relevant To This Court's Consideration Of Standing And Proceedings Below.

1. Facts.

Ordinance 12 regulates the activities of garbage haulers, not of the customers of garbage haulers. "This Ordinance shall govern the transportation and disposal of all Designated Waste generated or disposed of within the County, as required by State law, and all Haulers and other Persons engaged in transportation or disposal of Designated Waste within the County." Ordinance 12, § II, subs. 1 (Pet. App. 90a) (emphasis added).

The Ordinance defines other "Persons" to include "Designated Waste generators." Ordinance 12, § I, subs. 13 (Pet. App. 85a). However, as the context in which the term "other Persons" is used makes clear, the Ordinance regulates

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[1] See Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

waste "generators" only when they are "engaged in transportation or disposal" of designated waste.[2]

"Other Persons" are "engaged in transportation or disposal" of designated waste only when they "deliver" their own garbage to a designated facility. In the context of the Ordinance, delivery means the act of transporting waste to a designated facility and offering it for processing.[3]

The Robinson Rubber petitioners do not deliver their own garbage to designated facilities. The conditionally certified class represented by the Robinson Rubber petitioners is defined as:

> All residential and commercial generators of mixed municipal solid waste in Hennepin County who directly paid for waste removal at any time during the period June 1, 1989 to the present.

(Pet. App. 65a) (emphasis added). The Robinson Rubber petitioners hire commercial garbage haulers to collect and

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[2] "Disposal" is not defined in the Ordinance. However, the Minnesota Waste Management Act, with which Ordinance 12 is intended to comply, defines "disposal" and "dispose" as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any waste into or on any land or water . . . ." Minn. Stat. § 115A.03, subd. 9.

[3] See Ordinance 12, § IV, subs. 1 (Pet. App. 101a) ("Each Person shall use its best efforts to deliver only Acceptable Waste to the Facility"); Id. (the "obligation of each Person not to deliver Unacceptable Waste to the Facility shall not be limited by any inspection of such Person's vehicle by the County"); Id. (if the County finds Unacceptable Waste in a person's vehicle, "the Person delivering such delivery shall forthwith remove such entire delivery from the Facility for proper disposal elsewhere. All costs of such removal and disposal shall be borne by each Hauler"); see also Ordinance 12, § IV, subs. 2 (Pet. App. 101a-102a) (listing "Delivery Conditions" with which each "Person" must comply); Ordinance 12, § V, subs. 1 (Pet. App. 107a) ("Each Hauler or other Person who delivers Waste to the Facility must pay a Tipping Fee").

remove garbage from their homes and businesses. See Appellant's Appendix in the Court of Appeals ("Aplnt. App.") at 395, ¶ 30 (Complaint, alleging, "At all relevant times, the members of Plaintiff Class have contracted with haulers for the disposal of their County Waste, or have been charged by the municipality in which they reside for the removal of their County Waste").

Once the garbage leaves the curb, the commercial haulers "own" the garbage, Ordinance 12, § 3, subs. 3.07 (Aplnt. App. 144), and exercise exclusive control over its disposal. The commercial haulers, not their customers, paid the tipping fees at the designated waste processing facilities. Ordinance 12, § V, subs. 1 (Pet. App. 107a); Ordinance 12, § I, subs. 15 (Pet. App. 85a); Appellees' Appendix in the Court of Appeals ("Aplee. App.") 146.

The Robinson Rubber petitioners allege they were injured because their garbage bills were higher than they would have been in the absence of Ordinance 12. Their garbage bills were inflated, Petitioners allege, because Ordinance 12 required haulers to deliver waste to designated facilities, where the tipping fees that haulers paid generally were higher than tipping fees charged by competing landfills. Some haulers passed on to some customers an indeterminate amount of the haulers' increased disposal costs which, for some customers, resulted in higher garbage bills.[4]

This indirect effect on consumer garbage bills was not unexpected. Since the tipping fee was intended to fund the relatively high cost of waste processing as well as the County's recycling and other environmental programs,

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[4] For some Petitioners, the alleged pass-through of disposal costs also filtered through the municipalities in which they live. These municipalities, including the City of Minneapolis, either use municipal employees or contract with haulers for the collection and removal of all residents' garbage. Haulers bill the municipalities which, in turn, tax or otherwise charge residents to pay for the services.

Hennepin County understood that the tipping fees it charged generally would be higher than tipping fees that landfills charged. The County anticipated that many haulers would not absorb all of their increased disposal costs and, in many cases, would attempt to pass on at least some of the costs to their customers.[5] Nevertheless, Hennepin County did not require haulers to pass on disposal costs. Haulers were free to exercise their independent business judgments regarding whether to pass on disposal costs.

2. Proceedings Below.

Hennepin County moved to dismiss on the grounds that the Robinson Rubber plaintiffs did not satisfy Article III standing requirements and did not fall within prudential limitations on standing. The district court denied Hennepin County's motion and granted partial summary judgment in favor of plaintiffs, holding that plaintiffs had standing because they were "direct participants" in the market for waste processing services.

The court of appeals reversed. It held that the Robinson Rubber plaintiffs satisfied the minimal standing requirements of Article III, but did not fall within prudential limitations on standing. The court of appeals found that Ordinance 12 regulated waste haulers, not waste generators such as plaintiffs, and that plaintiffs were seeking to assert the constitutional rights of haulers to challenge the Ordinance. Consequently, plaintiffs' claims were barred by the third-party standing doctrine articulated in Warth v. Seldin, 422 U.S. 490 (1975). In addition, the court of appeals found that these

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[5] Hennepin County viewed this indirect economic consequence of flow control as a benefit because it made plain the correlation between waste volume and garbage bills and, consequently, encouraged waste generators to reduce and recycle.

plaintiffs' interest in lower garbage bills, as mere consumers at the end of a chain of commerce affected by Ordinance 12, was not within the zone of interests protected by the Commerce Clause.

B. Facts Relevant To This Court's Consideration Of Intrastate Designation And Proceedings Below.

1. Facts.

When Ordinance 12 first took effect in 1989, it required garbage haulers to deliver non-exempt, unprocessed mixed municipal solid waste generated in Hennepin County, Minnesota ("designated waste") to waste processing facilities designated by Hennepin County, or to waste processing facilities excluded or exempt from the Ordinance.[6] By negative implication, Ordinance 12 prohibited disposal of designated waste at all other facilities both within Minnesota and outside Minnesota.[7]

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[6] Exempt facilities included all processing facilities, in- and out-of-state, which existed when the Hennepin County designation plan was approved in 1985, two privately-operated processing facilities exempted by the Metropolitan Council (a regional agency created by the Minnesota legislature to coordinate planning and development in the seven-county Minneapolis-St. Paul metropolitan area), as well as facilities that applied directly to Hennepin County for exclusion. One of the Oehrleins plaintiffs, Knutson Services, Inc., received an exclusion from Hennepin County.

[7] As a practical matter, when the Ordinance first took effect it directed to designated or exempted/excluded facilities Hennepin County waste that otherwise would have been landfilled in Minnesota landfills, not in out-of-state landfills. Prior to the implementation of flow control, little if any Hennepin County waste was transported out-of-state. The interstate market for Hennepin County solid waste did not develop until the early to mid-1990s. Thus, contrary to Petitioners' allegation, Hennepin County did not "anticipate[] a direct impact on the generators' access to out-of-state markets . . . ." Petitioners' Petition at 5.

In December 1993, in light of the fact that this Court recently had granted certiorari in C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994), the Hennepin County Board passed a resolution suspending enforcement of all restrictions on the disposal of designated waste outside Minnesota. Consistent with Minn. Stat. § 473.848, which prohibits disposal of unprocessed Hennepin County and other Twin Cities metropolitan area waste in in-state landfills, Hennepin County continued to enforce Ordinance 12's restrictions on disposal of designated waste within Minnesota. In addition, the County Board bifurcated the definition of "designated waste," formalizing a distinction between waste destined for disposal within and outside Minnesota, to facilitate severability in the event of an adverse ruling on interstate designation.

Once the County suspended enforcement of interstate designation, certain haulers -- including Oehrleins plaintiffs Randy's Sanitation, Inc. and Gallagher's Service, Inc. -- immediately began shipping Hennepin County waste outside Minnesota. Ben Oehrleins and Sons and Daughter, Inc. et al. v. Hennepin County, 922 F. Supp. 1396, 1401 (D. Minn. 1996) (Pet. App. B) (noting "undisputed evidence that several [hauler] plaintiffs did ship waste out-of-state as soon as enforcement was suspended"); see also Oehrleins, 115 F.3d at 1386 ("It is beyond dispute that the 1993 suspension of interstate enforcement allowed waste to flow freely to out-of-state processors . . .").

2. Proceedings Below.

The district court found that both interstate and intrastate designation under Ordinance 12 discriminated against interstate commerce. Applying strict scrutiny, the district court held that both aspects of the Ordinance violated the dormant Commerce Clause, and granted partial summary

judgment in favor of the plaintiffs in both Oehrleins and Robinson Rubber.

The court of appeals affirmed the district court's holding that interstate designation under Ordinance 12 discriminated against interstate commerce in violation of the dormant Commerce Clause,[8] but reversed the district court's holding that intrastate designation discriminated against interstate commerce and was subject to review under strict scrutiny. The court of appeals remanded to the district court to review intrastate designation under the Pike balancing test, which will determine whether the putative benefits of intrastate designation under Ordinance 12 are clearly outweighed by the burdens, if any, on interstate commerce. This determination on remand is pending.

REASONS FOR DENYING THE WRIT

A writ of certiorari is unwarranted. The court of appeals' decision is entirely consistent with this Court's precedents and with the decisions of the other courts of appeals. Review would serve no purpose other than to examine and weigh evidence, discuss specific facts, and construe and interpret the language of Ordinance 12. This Court does not sit for such purposes. Texas v. Mead, 465 U.S. 1041, 1043 (1984).

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[8] Contrary to Petitioners' statement, Hennepin County has not "admitted" any violation of the Commerce Clause. See Petitioners' Petition at 2. Hennepin County has filed a conditional cross-petition seeking review of the court of appeals' holding that interstate designation under Ordinance 12 discriminated against interstate commerce in violation of the dormant Commerce Clause.

I. THE COURT OF APPEALS' STANDING DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND DOES NOT CONFLICT WITH THE DECISIONS OF THE OTHER COURTS OF APPEALS.

A. Consistent With This Court's Decision In Warth, The Court Of Appeals Properly Applied The Third-Party Standing Doctrine To The Unique Facts Of This Case.

The court of appeals concluded that the third-party standing doctrine bars Petitioners' claims based on its finding that Ordinance 12 regulates garbage haulers, not customers of garbage haulers such as Petitioners.[9] Haulers who choose to dispose of garbage out-of-state may be engaged in interstate commerce allegedly adversely affected by Ordinance 12, but their customers are not. Petitioners are merely local consumers whose complaint is that they paid "higher garbage bills due to the passed-on costs incurred by the haulers under the Ordinance. . . . Any relief due the generator plaintiffs turns on the rights of the *haulers* to be free of the Ordinance's designation requirements." Oehrleins, 115 F.3d at 1381 (emphasis in original).

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[9] Petitioners state that the third-party standing doctrine was the court of appeals' "alternative reason for denying standing . . . ." Petitioner's Petition at 12. In fact, the third-party standing doctrine was the court of appeals' first-stated reason for denying standing. Oehrleins, 115 F.3d at 1380-81. Therefore, Hennepin County addresses this rationale first.

1. A Writ Of Certiorari Is Inappropriate Because It Would Entail Detailed Review Of The Facts.

Petitioners' argument that the court of appeals' decision conflicts with this Court's precedents turns on whether the factual basis for the court of appeals' decision is sound. Petitioners contend that the court of appeals misconstrued and misinterpreted Ordinance 12 to regulate garbage haulers, as opposed to Petitioners, which led the court of appeals to misapply the third-party standing doctrine in conflict with this Court's precedents.

To review the issues presented by Petitioners, this Court must construe Ordinance 12 and evaluate and weigh the specific facts of this case. For this reason alone, a writ of certiorari is inappropriate. See Texas, 465 U.S. at 1043. In addition, neither the premise nor the conclusion of Petitioners' argument has merit.

2. A Writ Of Certiorari Is Not Warranted Because The Court Of Appeals' Decision Is Factually Sound And Does Not Conflict With This Court's Precedents.

a. The Court Of Appeals' Decision Is Factually Sound.

In their attempt to construct a conflict with this Court's decisions where none exists, Petitioners seriously mischaracterize Ordinance 12. Petitioners disingenuously assert that, as waste generators, they are a "regulated class" under Ordinance 12, Petitioners' Petition at 3, which was "forbidden, on pain of penalties, from contracting with waste haulers to dispose of their waste at any out-of-state facility." Id. at 5.

Petitioners' assertion is premised on a selective reading of the Ordinance and dubious logic. Petitioners argue that because Ordinance 12 regulates "other Persons," and "Person" is defined to included waste "generators," Ordinance 12 regulates Petitioners. Id. The fallacy of Petitioners' argument is obvious. Ordinance 12 does not regulate "other Persons" per se; it regulates "all Haulers and other Persons engaged in the transportation or disposal of" designated waste. (Pet. App. 90a); see Oehrleins, 115 F.3d at 1379 n.6 (rejecting plaintiffs' argument that Ordinance 12 regulates them because "Person" is defined to include "generators").

"Other Persons" are "engaged in the transportation or disposal" of designated waste when they deliver it to a designated facility. See Ordinance 12, § IV, subs. 1 (Pet. App. 101a); § IV, subs. 2 (Pet. App. 101a-102a). Thus, "generators" are subject to the Ordinance only when they deliver their own garbage to a designated facility.

While Petitioners may be waste "generators" in the sense that they "generate" or create garbage, they are not "generators" in the limited sense that the term is used in Ordinance 12. Petitioners place garbage in a can, and put the can on the curb for collection and removal by a commercial garbage hauler. As the court of appeals found, Petitioners are "consumers of waste disposal services supplied by garbage haulers . . . ." Oehrleins, 115 F.3d at 1380.

It distorts Ordinance 12 beyond all reason to suggest, as Petitioners do, that the Ordinance subjects customers of garbage haulers to any duties, obligations or "pain of penalties." Petitioners presented absolutely no evidence that they exercise any control over, have any obligations for, or suffer any penalty because of, the disposal of their garbage. Once the garbage leaves the curb, haulers own the garbage. Ordinance 12, § 3, subs. 3.07 (Aplnt. App. 144). Haulers alone are responsible for disposal, including payment of tipping fees at designated facilities. Ordinance 12, § V, subs.

1 (Pet. App. 107a); Ordinance 12, § I, subs. 15 (Pet. App. 85a); Aplee. App. 146.

Although Hennepin County anticipated that many haulers would attempt to pass on their costs of operation, including tipping fees, to their customers, Hennepin County never directed or required haulers to pass on their costs of complying with Ordinance 12. Haulers, exercising their independent business judgments, made individual decisions whether to pass on their costs and, if so, to which customers and in what amounts.

As the court of appeals found, Petitioners' alleged injury -- payment of garbage bills that were higher than they would have been if haulers had not been required to dispose of designated waste at designated facilities -- is the "economic consequence of the County's restriction of where haulers may deliver waste." Oehrleins, 115 F.3d at 1381. Petitioners sued as consumers to recover passed-on costs incurred by haulers to comply with the haulers' obligations under Ordinance 12.

b. The Court Of Appeals' Decision Does Not Conflict With This Court's Precedents.

The unique facts on which the court of appeals based its decision distinguish this case from the decisions of this Court which Petitioners maintain are offended, and bring this case in line with Warth, supra, which Petitioners maintain is irrelevant. None of the decisions which Petitioners suggest "conflict" with the court of appeals' decision even addresses the third-party standing doctrine. Unlike Petitioners, the plaintiffs in the decisions to which Petitioners cite were themselves subject to the challenged regulations. Therefore, there is no direct conflict, nor conflict in principle, between the court of appeals' decision and this Court's precedents.

General Motors Corp. v. Tracy, 117 S.Ct. 811 (1997), one of the cases to which Petitioners point, involved a

challenge to an Ohio statute which imposed a sales tax on purchases of natural gas, but exempted purchases from in-state utilities. General Motors, which purchased virtually all of its natural gas from out-of-state vendors and paid the sales tax, challenged the statute under the Commerce Clause. This Court held General Motors was subject to the statute and thus had standing because it was assessed the discriminatory tax. Standing obtains "where the customer is liable for payment of the tax and as a result presumably pays more for the gas it gets from out-of-state producers and marketers." Tracy, 117 S.Ct. at 818.

As the court of appeals noted in this case, because the Robinson Rubber plaintiffs are not liable for payment of tipping fees at designated facilities, they are not comparable to General Motors in Tracy. Indeed, the Robinson Rubber Petitioners are at least one step further down the chain of commerce and causation, in a position comparable to customers of General Motors who ultimately might bear the cost of the tax subsumed in higher truck prices. Oehrleins, 115 F.3d at 1381. General Motors customers were not, and could not have been, plaintiffs in Tracy. Therefore, Tracy is inapposite and does not conflict with the court of appeals' decision in this case.

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), is nearly identical to Tracy. Bacchus involved a Hawaiian statute which imposed a 20 percent excise tax on sales of liquor wholesale, but exempted certain liquors produced in-state. Although the tax discriminated against out-of-state liquor producers, the in-state wholesalers had standing because "wholesalers are . . . liable for the tax. Although they may pass it on to their customers, and attempt to do so, they must return the tax to the State whether or not their customers pay their bills." Bacchus, 468 U.S. at 267.

The liquor wholesalers in Bacchus are comparable to the haulers in this case, not to the Robinson Rubber petitioners.

Although the haulers may attempt to pass on their costs to their customers, the haulers must pay the tipping fees regardless of whether their customers pay their bills. The Robinson Rubber petitioners are comparable to the customers of the liquor wholesalers in Bacchus. The customers of the liquor wholesalers were not plaintiffs in Bacchus; consequently, the third-party standing doctrine did not come into play. Thus, Bacchus also is inapposite.[10]

Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine, 117 S.Ct. 1590 (1997), presents only a slightly different situation. Camps involved a Maine statute which exempted charitable institutions from real estate taxes, except when the institution was operated principally for the benefit of non-residents. A non-profit Maine summer camp, which attracted 95 percent of its campers from out-of-state and which was denied the real estate tax exemption, challenged the statute.

The standing of the plaintiff to sue under the Commerce Clause was not directly at issue in Camps. Instead, the defendant argued that the dormant Commerce Clause was not implicated because the camp's services were consumed entirely within Maine. This Court rejected the argument, noting that the camp was engaged in interstate commerce both as a purchaser and as a provider of goods and services because it marketed those services to out-of-state campers. Camps, 117 S.Ct. 1596.

Petitioners in this case argue that the court of appeals should not have applied the third-party standing doctrine to bar their claims because here, as in Camps, Petitioners are

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[10] If Petitioners' reasoning were correct, GM truck buyers in Tracy, customers of liquor stores in Bacchus, and every other customer of a party subject to a discriminatory regulation would have standing to assert a Commerce Clause challenge. The third-party standing prudential limitation would be no limitation at all.

purchasers of services and, thus, engaged in interstate commerce in their own right. The analogy does not fit.

Unlike the Maine camp and its out-of-state campers, Petitioners are not parties to the transaction in interstate commerce which is allegedly adversely affected by the challenged regulation. Petitioners place their garbage in can, put the can on the curb at their homes and businesses, pay a local hauler to collect the garbage, and wash their hands of it. Petitioners play no part in the subsequent transactions between haulers, who own and control the collected garbage, and out-of-state disposal facilities.[11]

Even if Petitioners somehow could be construed to be "engaged in interstate commerce" when they put their garbage cans on the curb for removal, they are not parties to the critical transaction -- the only transaction regulated by Ordinance 12 -- between hauler and disposal facility. The third-party standing doctrine applies to Petitioners because, unlike the Maine camp, they are not subject to the challenged regulation; any relief which Petitioners might claim turns on the rights of haulers to be free of regulation. Therefore, the court of appeals' decision also is consistent with Camps.[12]

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[11] Thus, Petitioners are unlike the hypothetical out-of-state waste "generators" referred to in Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 504 U.S. 353 (1992), who were presumed to arrange disposal at the plaintiff landfill. Id. at 359. The hypothetical Fort Gratiot "generators" are comparable to haulers in this case.

[12] Contrary to Petitioners' allegations, the court of appeals' decision also does not conflict with Bennett v. Spear, 117 S.Ct. 1154 (1997), Fort Gratiot, supra; Wyoming v. Oklahoma, 502 U.S. 437 (1992); Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977); Boston Stock Exchange, et al. v. State Tax Commission, et al., 429 U.S. 318 (1977), nor with Government Suppliers Consolidating Services, Inc. v. Bayh, 975 F.2d 1267 (7th Cir. 1992), cert. denied 506 U.S. 1053 (1993). None of these cases to which Petitioners cite even discusses the third-party standing doctrine, and none involves consumer standing. In each case, the plaintiff's connection with the regulated transaction went far beyond the indirect harm

c. The Court Of Appeals' Decision Is Controlled By This Court's Decision in Warth.

Petitioners cite only one case, Warth, supra, which addresses the third-party standing doctrine. Petitioners do not suggest that the court of appeals' decision conflicts with Warth. Nor do Petitioners argue that the court of appeals misconstrued Warth. Instead, Petitioners argue that "[t]he court of appeals' Warth v. Seldin third-party standing analysis is . . . plainly irrelevant," Petitioners' Petition at 17, because the court of appeals erred factually in determining that customers of garbage haulers are not subject to Ordinance 12. As noted above, this is not the type of alleged error which is appropriate for review by this Court.

Moreover, notwithstanding Petitioners' casual dismissal of Warth as "irrelevant," the court of appeals' analysis is applicable and unerring. In Warth, several groups of plaintiffs challenged city zoning ordinances that allegedly barred development of low-income housing. One group of plaintiffs

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to personal consumer finances alleged by Petitioners. See Bennett, 117 S.Ct. at 1160 (petitioners had a competing commercial interest in waters that the government respondent declared necessary for preservation of endangered fish); Fort Gratiot, 504 U.S. at 357 (standing not challenged; waste import restrictions prevented plaintiff landfill from receiving out-of-state waste); Wyoming, 502 U.S. at 448-49 (the State's sovereign interest threatened by statute which deprived Wyoming of specific tax revenues); Hunt, 432 U.S. at 345 (plaintiff alleged a direct injury attributable to challenged statute); Boston Stock Exchange, 429 U.S. at 320 n.3 (New York's higher tax on out-of-state securities sales diverted sales from plaintiff out-of-state stock exchanges to New York exchanges); Government Suppliers Consolidating Services, 975 F.2d at 1274 (standing not challenged; ban on backhaul of solid waste would cause "undisputed . . . severe adverse effects" on business of plaintiff broker of backhauling services that arranged for others to backhaul).

was comprised of residents of a neighboring community who alleged that they suffered "economic injury consequent to" the city's alleged discriminatory practices. Warth, 422 U.S. at 508. This Court held that these plaintiffs' claim "falls squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." Id. at 509.

As the court of appeals found, the injury claimed by Petitioners is of the same sort. Petitioners are not regulated by Ordinance 12, do not pay and are not liable for tipping fees at designated facilities, and are not parties to any interstate transaction allegedly adversely affected by Ordinance 12. Plaintiffs' claimed injury is that -- as customers of parties to an interstate transaction allegedly adversely affected by Ordinance 12 -- the garbage bills they paid were higher because haulers passed on the haulers' costs of complying with Ordinance 12. Oehrleins, 115 F.3d at 1381.

Here, as in Warth, Petitioners claim that they suffered economic injury consequent to the County's alleged discriminatory regulation of others. Id. Because Petitioners are seeking to assert the constitutional rights of haulers, Petitioners' claims "fall within the third-party standing doctrine described in Warth." Id.

B. Consistent With This Court's Precedents, The Court Of Appeals Properly Applied The Zone Of Interests Rule To The Unique Facts Of This Case.

Petitioners' contention that the court of appeals' decision "eviscerated" this Court's decision in Dennis v. Higgins, 498 U.S. 439 (1991), misconstrues both the court of appeals' decision and this Court's decision. Contrary to Petitioners' assertion, the court of appeals neither held nor implied that the Commerce Clause was not designed to benefit individuals. Nor did the court of appeals hold or imply that a plaintiff must

invariably allege a direct burden or injury to satisfy the zone of interests test. The court of appeals held that consumers, whose only alleged injury is that they have shouldered an "end-line burden" such as higher garbage bills due to costs passed down through the chain of commerce, do not assert an interest that even arguably falls within the zone of interests protected by the Commerce Clause. Oehrleins, 115 F.3d at 1382. This decision does not conflict with Dennis.

The petitioner in Dennis was an Ohio motor carrier which challenged motor carrier taxes imposed by Nebraska on vehicles registered in other states and operated in Nebraska. The petitioner's standing was not at issue. The question presented to this Court was whether the Commerce Clause confers rights that individuals may vindicate by bringing suit under § 1983.

This Court held that the Commerce Clause does confer rights that may be vindicated under § 1983 because the Commerce Clause was "intended to benefit those who, like petitioner, are engaged in interstate commerce." Dennis, 498 U.S. at 449. In support of its conclusion, this Court quoted Justice Jackson's characterization of the purposes of the Commerce Clause, including the passage, "Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any." Id. at 449-50 (quoting H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949)).

Petitioners seize on this snippet to argue that, merely by virtue of their status as consumers, their claims fall within the zone of interests protected by the Commerce Clause. However, as the context makes clear, the passage does not support Petitioners' argument.

As this Court stated in introducing the H.P. Hood passage, the Commerce Clause was "intended to benefit those who . . . are engaged in interstate commerce." Id. at 449 (emphasis added). At most, the Dennis and H.P. Hood dicta

suggest that there may be circumstances in which consumers are "engaged in interstate commerce" and thus protected by the Commerce Clause.[13] However, those circumstances are not found in this case. As the court of appeals found, Petitioners are customers of parties involved in disposal transactions that are affected by a regulation that allegedly discriminates against interstate commerce. Oehrleins, 115 F.3d at 1380-81. Petitioners themselves are not "engaged in interstate commerce" that is allegedly adversely affected by a regulation that discriminates against interstate commerce. They are merely consumers who at most shoulder the "end-line burden" of costs haulers incur to comply with Ordinance 12 and pass on down through the chain of commerce.

This Court did not hold in Dennis, and never has held, that persons come within the zone of interests protected by the Commerce Clause merely by virtue of their status as ultimate consumers. In fact, this Court has refused to extend standing to indirect consumers in the antitrust context. See Illinois Brick Co. v. Illinois, 431 U.S. 720, 737-38 (1977) (indirect purchasers suing to recover under a pass-on theory do not have standing to assert antitrust claims). Therefore, the court of appeals' decision that Petitioners, as mere consumers, do not fall within the zone of interests protected by the Commerce Clause is consistent with this Court's precedents.[14]

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[13] The H.P. Hood passage also may be read as merely recognizing that consumers are ultimate beneficiaries of the free flow of commerce across state lines, not that consumers have actionable rights under the dormant Commerce Clause.

[14] The court of appeals' decision also is consistent with the Ninth Circuit Court of Appeals' decision in Individuals for Responsible Gov't, Inc. v. Washoe County, 110 F.3d 699 (9th Cir. 1997), petition for certiorari filed, 66 U.S.L.W. 3157 (U.S. Aug. 1, 1997) (No. 97-269), a case which the court of appeals cited as analogous. See Oehrleins, 115 F.3d at 1382. The plaintiffs in Washoe County were not within the zone of interests protected by the Commerce Clause because even though there was a direct causal link between their alleged injury -- being forced to pay for unwanted garbage

In addition, while this Court consistently has interpreted the dormant Commerce Clause to protect out-of-state interests unrepresented in the local political process, it never has interpreted the dormant Commerce Clause to protect local residents from the effects of local regulations imposed by their own elected officials. If the Robinson Rubber petitioners feel burdened by Ordinance 12, they have a political remedy. Cf. South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177, 187 (1938) (fact that the burden of local regulation falls on in-state interests helps insure that a state's political processes will serve as a check against unduly burdensome regulation).

Local consumers such as Petitioners are excluded from the zone of interests protected by the Commerce Clause for good reason. To extend the protection of the Commerce Clause to all chain-of-commerce consumers, as Petitioners urge, would have extraordinary consequences. Every consumer who could allege de facto causality between higher consumer costs and an unconstitutional regulation that allegedly adversely affected some transaction in the chain of commerce would have a cause of action under the Commerce Clause. Contrary to Petitioners' argument, principles of foreseeability and proximate cause would not prevent an unbounded expansion of such lawsuits because it is assumed that parties actually engaged in interstate commerce pass on some part of their costs to consumers. See Bacchus, 468 U.S. at 267.

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services -- and enactment of the challenged statute, there was no link between the alleged injury and the alleged barrier to interstate commerce. Washoe County, 110 F.3d at 703-04. Similarly, in this case, regardless of whether there is a causal link between Petitioners' payment of higher garbage bills and enactment of Ordinance 12, there is no link between the alleged injury and the alleged burden on interstate commerce because Petitioners are not parties to the allegedly burdened interstate transaction between haulers and out-of-state landfills.

C. The Court Of Appeals Did Not Subvert Legal Principles To Avoid Outrageous Implications Of Petitioners' Standing Argument.

Petitioners' final standing argument is not worthy of this Court's review because the alleged "conflict" that it misidentifies arises from a mere observation -- neither a finding, nor a holding nor even dicta -- in the court of appeals' opinion. Moreover, the court of appeals' observation does not conflict with this Court's decisions, and Petitioners' wild speculation as to the intent and effect of the court of appeals' observation is without foundation.

At the conclusion of its decision on standing, the court appeals made the observation, in a footnote, that it was "mindful that granting standing to consumers bearing passed-on costs in Commerce Clause cases could have serious repercussions on state and local governments' ability to enact economic regulations." Oehrleins, 115 F.3d at 1382 n.9. This observation is an extension of the court's discussion regarding the implications of Petitioners' argument: "Again, if the ultimate cost of economic regulation to consumers were within the zone of interests of the Commerce Clause, then every consumer could properly challenge such regulations." Id. at 1382. Both comments go to show the unprecedented, unsupported and incredible nature of Petitioners' argument.[15]

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[15] Although the potential financial consequences of this lawsuit are staggering (Petitioners claim in excess of $150 million in damages), there is nothing in the footnoted observation which would suggest, as Petitioners do, that the court of appeals adopted the rationale that financial consequences of an unconstitutional act justify withholding relief. As its decision makes abundantly clear, the court of appeals "withheld relief" from Petitioners because Petitioners lack standing. See Oehrleins, 115 F.3d at 1379-82. Therefore, the court of appeals' decision does not conflict with McKesson v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990).

There is nothing improper about the court of appeals' observation. A court should be "mindful" of the implications of the arguments presented to it. To consider the implications of an argument is one way to test its validity: if the implications are outrageous, so too might be the argument itself. Cf. Illinois Brick, 431 U.S. at 737-41 and 741 n.24 (discussing potential implications of allowing indirect purchasers to recover using pass-on theories in antitrust cases).

To be "mindful" of, and to comment on, outrageous implications of Petitioners' standing argument does not suggest, in any way, that the court of appeals subverted legal principles to avoid the outrageous implications. The court of appeals' holding is solidly grounded and supported in the full opinion.

II. THE COURT OF APPEALS' DECISION THAT INTRASTATE DESIGNATION DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE AND SHOULD BE REVIEWED UNDER THE PIKE BALANCING TEST IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND DOES NOT CONFLICT WITH THE DECISIONS OF THE OTHER COURTS OF APPEALS.

A. The Court Of Appeals Did Not Disregard Evidence Of Discriminatory Purpose And Effect.

Petitioners drop all pretense that there is a conflict with this Court's decisions in arguing that the court of appeals "disregarded" evidence of discriminatory purpose and effect in determining that the intrastate application of Ordinance 12 should be reviewed under the Pike balancing test. Petitioners would have this Court play the role of fact-finder, evaluating

and weighing the evidence, and reject the court of appeals' judgment.[16] For this reason alone, the issue presented is not worthy of review by this Court. In addition, Petitioners' argument is without foundation.

The court of appeals did not "disregard" any evidence of alleged discriminatory purpose and effect presented to it. As the court of appeals' opinion shows, the court carefully considered the evidence presented and found it unconvincing. The court of appeals examined and discussed in detail Petitioners' contention that Hennepin County's suspension of interstate designation, and the alleged implied threat that enforcement might be resumed, discriminated against interstate commerce in purpose.

> The plaintiffs have produced no evidence that the Ordinance has had such an effect, nor is there any evidence that the County intended the Ordinance to have such an effect. It is beyond dispute that the 1993 suspension of interstate enforcement allowed waste to flow freely to out-of-state processors, while working a comparative disadvantage to local entities. This hardly shows a purpose to discriminate against out-of-state concerns.

Oehrleins, 115 F.3d at 1386.

The court of appeals also specifically considered and rejected Petitioners' contention that a deputy county attorney's memorandum, which discusses the potential

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[16] Petitioners implicitly concede the fact-bound nature of this issue when they argue in the concluding section of the petition that when "faced with conflicting evidence as to the [discriminatory] purpose or effect," the court of appeals should have remanded to permit the district court to determine whether a discriminatory purpose or effect existed. See Petitioners' Petition at 25.

consequences of the suspension of interstate designation, evidences a discriminatory purpose.

> In trying to show a discriminatory purpose, the plaintiffs put much weight on a memorandum from a deputy county attorney concerning the 1993 amendments to the ordinance and suspension of interstate enforcement. . . . Even if we were to impute the deputy county attorney's opinion to the County, we do not find this language as sinister as plaintiffs suggest. In our view, the memorandum reflects that, given the uncertainty of the law at the time, neither the County nor the waste haulers could anticipate what aspects of Ordinance 12 might ultimately be found valid or invalid.

Id. at 1386 n.12. The court of appeals did not imply, as Petitioners suggest, that discriminatory purpose may be found only when the government acts in "bad faith." The court simply found that the evidence did not show a discriminatory purpose.[17]

Similarly, the court of appeals considered and rejected all of the alleged discriminatory effects which Petitioners presented, including arguments that the threat of renewed enforcement of interstate designation discouraged haulers from entering into long-term contracts with out-of-state

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[17] The court of appeals' judgment in refusing to apply strict scrutiny based on the deputy county attorney's memorandum is consistent with Maine v. Taylor, 477 U.S. 131, 149 (1986) (rejecting contention that a few sentences of allegedly overt protectionist motive "convert[ed] the Maine statute into an economic protectionist measure"), and Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463 n.7, 471 n.15 (1981) ("We will not invalidate a state statute under the [Commerce Clause] merely because some legislators sought to obtain votes for the measure on the basis of its beneficial side effects on state industry").

disposal facilities, and that intrastate designation precluded out-of-state concerns from establishing waste processing facilities in Minnesota. Id. at 1386-87. As the court of appeals noted, Petitioners "produced no evidence" of such alleged effects. Id. at 1386.[18] The other alleged discriminatory effects mentioned in Petitioners' petition, equally unsupported by evidence and meritless, were not even argued to the court of appeals; therefore, the court of appeals could not have "disregarded" them.

B. Remanding For Reconsideration Of Evidence Of Discriminatory Purpose And Effect Would Have Served No Purpose.

Petitioners' argument that the court of appeals "overstepped its authority" because it did not remand to the district court to determine whether intrastate designation was infected by discriminatory purpose or effect provides no basis for this Court to accept review. Given the procedural posture of the case, the court of appeals' decision was both within its authority and appropriate. Moreover, the court of appeals' decision does not conflict with this Court's decisions or with the decisions of any other court of appeals.

This case came to the court of appeals on the district court's grant of Petitioners' motion for summary judgment. From Petitioners' perspective, all material facts, including all evidence of alleged discriminatory purpose and effect, were before the district court. The district court evaluated this

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[18] Although the court of appeals rejected Petitioners' speculation that intrastate designation precludes out-of-state concerns from establishing waste processing facilities in Minnesota and, thus, discriminates against interstate commerce, the court acknowledged that the argument, if supported by evidence, "may be relevant to a Pike analysis . . . ." Oehrleins, 115 F.3d at 1387 n.14. Thus, on remand, Petitioners will have a second opportunity to present evidence related to this contention.

evidence and determined that it showed discriminatory purpose and effect. See Oehrleins, 922 F. Supp. at 1403-05. However, in the opinion of the court of appeals, the district court misevaluated the evidence. Upon reversing the decision of the district court, it would have served no purpose for the court of appeals to remand for the district court to reconsider evidence of discriminatory purpose and effect.

In this respect, Chambers Medical Technologies of South Carolina, Inc. v. Bryant, 52 F.3d 1252 (4th Cir. 1995), and Harvey & Harvey, Inc. v. County of Chester, 68 F.3d 788 (3rd Cir. 1995), cert. denied 116 S.Ct. 1265 (1996), are inapposite. In Chambers, the Fourth Circuit Court of Appeals remanded because it was "unable to determine from the record whether the district court resolved the question of discriminatory purpose against [the defendant] or whether it simply failed to address the question . . . ." Chambers, 52 F.3d at 1262. Similarly, in Harvey & Harvey, the Third Circuit remanded for determination of issues which the district courts had failed to consider. Harvey & Harvey, 63 F.3d at 791. In contrast, the district court in this case clearly had considered and resolved, albeit wrongly, the questions of discriminatory purpose and effect.

The only pertinent issue which the district court did not address in the first instance is whether the putative benefits of intrastate designation are clearly exceeded by its burdens, if any, on interstate commerce. The court of appeals remanded this issue, Oehrleins, 115 F.3d at 1387, which is pending in the district court.[19]

If intrastate designation does not pass the Pike balancing test on remand, the issue presented to this Court -- whether

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[19] In determining that an intrastate designation ordinance is properly reviewed under the Pike balancing test, as opposed to strict scrutiny, the court of appeals' decision is consistent with the Second Circuit Court of Appeals' decision in Gary D. Peake Excavating v. Town Bd. of Hancock, 93 F.3d 68 (2nd Cir. 1996).

intrastate designation discriminates against interstate commerce -- will be moot.[20] Under these circumstances, Petitioners' petition should be denied. See Brotherhood of Locomotive Firemen v. Bangor & Aroostoock R. Co., 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case [and thus] it is not yet ripe for review by this Court").

[20] The questions presented in Petitioner's petition also might be moot if Congress acts on proposed legislation to retroactively authorize flow control. In 1994, the House passed a flow control authorization bill, and the Senate came within one vote of authorizing flow control. Congress currently is reconsidering the issue.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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